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Roxanne Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street S.E.
Washington, D.C. 20570-0001

Re: Comments to Proposed Rule on Standard for Determining Joint-Employer Status

Dear Ms. Rothschild:

On behalf of Polsinelli PC's Global Franchise and Supply Chain Practice, I write in strong support for the Board's proposed rule clarifying the standard for determining joint-employer status under the National Labor Relations Act. Our franchisor clients have experienced significant distress and confusion since the Board's 2015 decision in Browning-Ferris Industries of California, Inc., 362 NLRB No. 186, 2015 WL 5047768 (Aug. 27, 2015), which overturned the traditional "direct and immediate control" standard in favor of a vague, expansive standard under which indirect control through an intermediary or the reserved right to control, even if unexercised, may be sufficient to find a joint-employer relationship.

In the wake of Browning-Ferris's adoption of an expansive joint-employer standard, we have witnessed franchisors make significant changes to the way they interact and support franchisees. Specifically, many franchisors now provide less franchisee support, training, brand standards inspections, and/or business coaching out of fear that such franchisee support or interactions may trigger joint-employment liability under Browning-Ferris. Such franchisor reduction in franchisee support jeopardizes implementation and enforcement of system-wide brand standards and uniformity, thereby harming the overall franchise system, individual franchisees, and customer experiences. As a result of the harm and confusion caused by Browning-Ferris, we strongly support the return to the traditional "direct and immediate control" standard set forth in the proposed Section 103.40.

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In addition to writing to express our general support for the proposed rule, we also write to propose revision and clarification to one of the enumerated examples. Example 6 to Section 103.40 states: "Under the terms of a franchise agreement, Franchisor and Franchisee agree to the particular health insurance plan and 401(k) plan that the Franchisee must make available to its workers. Franchisor has exercised direct and immediate control over essential employment terms and conditions of Franchisee's employees." The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46681, 46697 (proposed Sept. 14, 2018) (to be codified at 29 C.F.R. § 103.40). Our concern is that, as currently drafted, this example could be read as suggesting that the mere potential availability of certain benefits voluntarily offered by the employer-franchisee could create joint-employer exposure if the franchisor had any role in making options available. The situation described in Example 6 (where a franchisor mandates specific health or retirement benefits that franchisees must offer to the franchisees' employees) should be contrasted against the situations where a franchisor recommends (but not does mandate) that franchisees offer certain benefits or whether a franchisor merely coordinates the availability of a particular health insurance plan or 401(k) that independent franchisees may voluntarily choose—or not—to offer to such franchisees' employees.

Accordingly, we recommend adding the following to the end of Example 6: "However, Franchisor has not exercised direct and immediate control over essential employment and conditions of Franchisee's employees to the extent the Franchisor merely recommends or coordinates the availability of certain benefits that Franchisee is not obligated to offer to its employees."

Thank you for your consideration.

Sincerely,

Jess A. Dance